

87-1304

NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

1

Supreme Court, U.S.
FILED
JAN 13 1988
JOSEPH F. SPANIOL, JR., DEERK

BERNHARD ROSEE,
Petitioner

vs.

COMMODITY FUTURES TRADING COMMISSION,
A Federal Agency, and
BOARD OF TRADE OF THE CITY OF CHICAGO,
An Illinois Corporation,
Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BERNHARD ROSEE
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23 P8



QUESTION PRESENTED FOR REVIEW

WHETHER THE DISTRICT COURT HAS JURISDICTION TO
COMPEL THE COMMODITY FUTURES TRADING COMMISSION
TO TAKE ENFORCEMENT ACTIONS AGAINST THE CHICAGO
BOARD OF TRADE, WHERE NEWLY DISCOVERED EVIDENCE
DEMONSTRATES THAT AN ARBITRATION AWARD HAD BEEN
FRAUDULENTLY PROCURED.

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ORDER BELOW

The Order below is not reported. It is
reproduced in the Appendix to this Petition.

JURISDICTION

The judgment of the Court of Appeals was
entered on September 18, 1987. This Court has

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entered an Order granting Petitioner a thirty day extension of time in which to file this Petition. The jurisdiction of this Court is invoked, pursuant to 28 U.S.C. Section 1254(1).

STATEMENT OF FACTS

The Petitioner is Bernhard Rosee, a 90 year old citizen who has, for over a quarter of a century, fought to clear his name; a name tainted at Rosee's expense, by fraud, forgeries and perjury committed by others.

Rosee was a member of the Chicago Board of Trade, and he became a party to an arbitration proceeding to resolve a dispute with commission merchants Baggot and Morrison. Rosee alleges that, as the result of certain fraudulent conduct, including the use of forged documents, Rosee was stripped of his membership and seat on the Board of Trade and deprived of his means of livelihood - all the result of the fraudulently obtained arbitration award. See, the District Court's Memorandum Opinion of July 9, 1986, at pp. 4-6.

Rosee thereafter filed a lawsuit in the Illinois state court, and was awarded over \$700,000.00 in compensatory and punitive damages. On appeal, however, the Illinois Appellate Court ruled that Rosee had failed to meet

his burden of proof ("clear and convincing" evidence of fraud) and vacated the judgment. 43 Ill. App. 3d 203 (1976), cert. denied, 434 U.S. 837 (1977).

Throughout this period of time, the federal district court refused to hear Rosee's case on the merits, ruling that he had failed to show sufficient federal involvement in the alleged fraud. See, e.g., the District Court's Memorandum Opinion, supra at 11; quoting District Court Judge Hubert Will's statement that "whether or not Mr. Rosee was defrauded by his brokers or failed to receive a fair hearing are not matters over which we have jurisdiction." As noted by the Court of Appeals in their Order of September 18, 1987, at fn 2, Judge Will has stated that the evidence used against Rosee included "obvious forgeries." As a matter of fact, Judge Will went even further, stating on September 13, 1977, in open court, that "I am satisfied that some of the documents which were tendered to me by the government, and I think (the Assistant U.S.

Attorney) is satisfied that some of the documents which were tendered to me by the government were forgeries, were incorrect (t)he handwriting doesn't match, and a lot of other things are wrong (t)he figures don't jibe (t)hey can't possibly be bona fide documents." Rosee v. Board of Trade, 63 C 1348 (N.D. of Ill.).

During the course of the past several years, Rosee alleges that he unearthed new evidence which would conclusively demonstrate the fraud committed upon him. However, the Chicago Board of Trade refused to grant him a rehearing of the arbitration proceeding, and the Commodity Futures Trading Commission (hereinafter CFTC) refused to take any action on the matter. Rosee therefore filed the action, below, seeking an order from the district court to compel the CFTC to take appropriate enforcement action.

The district court ruled that the federal courts lack the authority to enter such an order, and the Court of Appeals affirmed.

ARGUMENT

THE DISTRICT COURT HAS JURISDICTION TO COMPEL THE COMMODITY FUTURES TRADING COMMISSION TO TAKE ENFORCEMENT ACTIONS AGAINST THE CHICAGO BOARD OF TRADE, WHERE NEWLY DISCOVERED EVIDENCE DEMONSTRATES THAT AN ARBITRATION AWARD HAD BEEN FRAUDULENTLY PROCURED.

The Commodity Exchange Act, 7 U.S.C. Sect. 1, et seq., provides for the federal regulation of futures markets, and provides that the Commodity Exchange Commission (now CFTC) is authorized to order contract markets (and officers, agents and employees) to cease and desist from violating the Act itself, or the contract market's own rules. See Ricci vs. Chicago Mercantile Exchange, 409 U.S. 289 (1973). Petitioner submits that where, as here, a contract market relies upon fraudulent evidence to deprive one of its members (Rosee) of his membership, his seat and his livelihood, and refuses to take corrective action (a rehearing of the arbitration hearing, as provided by Rule 550 of the Chicago Board of Trade) when presented with proof of the fraud - then it is an abuse of discretion, and an arbitrary and capricious

act on the part of the CFTC to refuse to initiate enforcement proceedings. For this reason, Heckler v. Chaney, ___ U.S. ___, 105 S. Ct. 1649 (1985), is distinguishable.

It is axiomatic that a judgment based upon fraud is a nullity. To refuse to grant Rosee an opportunity to overturn the fraudulently obtained arbitration award is to deprive Rosee of his property rights (his seat, membership and livelihood) without due process of law. This Court, in Heckler v. Chaney, supra at 1659, stated "No colorable claim is made in this case that the agency's refusal to institute proceedings violated any constitutional rights of the respondents, and we do not address the issue that would be raised in such a case." (Emphasis added). The present case presents this Court with this issue.

CONCLUSION

It was fundamentally unfair for the Board of Trade to refuse to permit Rosee to present evidence that the arbitration award was procured through the use of forged documents and fraud. The refusal of the CFTC to initiate enforcement proceedings was an absolute abdication of the power and authority vested in it by Congress.

All Rosee has ever asked for is the opportunity to have his dispute heard in a fair and impartial manner. This Court should grant that request.

Respectfully submitted,

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Petitioner, Pro Se

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

MEMORANDUM OPINION AND ORDER

This action is the latest in a series of lawsuits that represent an ongoing struggle by Bernhard Rosee ("Plaintiff") to right what he perceives to be an egregious wrong done to him by Defendants, Commodity Futures Trading Commission ("CFTC") and Board of Trade of the City of Chicago ("Board of Trade") some 26 years ago when he was removed from membership on the Board of Trade. The complaint is rather ambiguous and the Court has had some difficulty understanding precisely what relief Plaintiff seeks. Plaintiff's original complaint sought certain trading records alleged to be in the possession of the CFTC and the Board of Trade, \$30 million in pre-judgment interest, \$20 million in punitive and exemplary damages, and an order directing the CFTC and the Board of Trade to reinstate Plaintiff as a member in good standing on the Board

of Trade. Plaintiff's present amended complaint seeks none of these things. The final paragraph asks only that the court "compel the CFTC and the Chicago Board of Trade to enforce the rules and regulations of the Commodity Exchange Act." The only rule to which the complaint refers is Board of Trade Rule 550.00, which provides, in part:

A suspended or expelled member or member firm, and any member or member firm that has been fined, may petition the Directors for a rehearing. Upon presentation of the petition, the Board of Directors, by a majority vote, may instruct the Chairman of the Board to appoint a committee of three members of the Board to examine the petition and determine whether or not the petitioner is entitled to a rehearing on the basis that his conviction was the result of false testimony or was otherwise unjust or improper.

Although the complaint does not refer to any other paragraph of Rule 550.00, the state further provides that after the committee reports its findings to the Board, the Board may order a rehearing, and

(i) if it is found, upon a rehearing before the Board, that such member

or member firm was mistakenly expelled, suspended, or fined, or that the penalty imposed was excessive, the prior disciplinary action against such member or member firm may be set aside or the penalty mitigated by the Directors.

Giving the complaint its most reasonable construction, we interpret it to ask this court to compel the CFTC to force the Board of Trade to grant Plaintiff a rehearing or at least to force the Board of Trade to convene a committee to determine whether he is entitled to a rehearing. Plaintiff seems also to be asking us to order in advance that the result of any rehearing be reinstatement of Plaintiff as a member on the Board of Trade. Both the CFTC and the Board of Trade have filed motions to dismiss. For the reasons set forth below, those motions are granted.

Facts

The facts of this case have been fully recited numerous times in the various opinions dealing with the dispute between Plaintiff and Defendants, and we see no need to repeat them

in great detail here. It suffices to say that sometime prior to January 1958, Plaintiff became a customer of Baggot and Morrison, a co-partnership doing business as commission merchants. Plaintiff's trades were cleared through this firm. In 1960 Baggot and Morrison decided to wind up their partnership, and determined at that time that Plaintiff's account had a net deficit balance. Plaintiff refused to pay the amount allegedly due, insisting that he had no way of determining whether the amount shown in the firm's records was correct because the firm had failed to supply him with any reports regarding his account.

Morrison decided to press his claim against Plaintiff through the procedures of the Board of Trade. Plaintiff requested that the matter be referred to an arbitration committee. The arbitration committee held a hearing and, after disallowing certain claims, ordered Plaintiff to pay Morrison approximately \$11,000.00. Plaintiff appealed the award, which was affirmed

by the Committee of Appeals. When Plaintiff refused to satisfy the award, the Board of Directors voted to suspend him from membership on the Board of Trade and subsequently, pursuant to Board of Trade Rules, ordered Plaintiff's membership sold.

Plaintiff's numerous lawsuits instituted since the sale of his membership have all sought, by various means, to reverse that decision and have his membership reinstated. Plaintiff has adamantly maintained throughout that the arbitration committee received false and fraudulent information and that the committee's decision was tainted by this fraud. In his current lawsuit, Plaintiff alleges that he has received "newly discovered evidence" which proves Defendants' fraudulent misconduct. The complaint is ambiguous, but it also appears to allege that Defendants are continuing to conceal certain important records from Plaintiff and that he has been a victim of this fraudulent concealment for 26 years. As a result, the complaint seems to

allege that Plaintiff is entitled to a rehearing by the Board of Trade under Rule 550.00 and that the CFTC should be required to insist on this rehearing since the Board of Trade will not undertake to rehear Plaintiff's case voluntarily.

Discussion

We are unable to afford Plaintiff the relief he seeks for a number of reasons. First, neither the complaint nor any of Plaintiff's other filings provide this court with any situation indicating that the court has the authority to compel the CFTC or the Board of Trade to comply with his demands. Our own research leads us to conclude that we do not have this authority. In Heckler v. Chaney, ___ vs. ___, 105 S. Ct. 1649, 1658-1659 (1985), the Supreme Court explicitly held that agency decisions not to undertake certain enforcement actions are presumptively unreviewable. That presumption can only be overcome when Congress has indicated otherwise in the applicable statute. The

Court stated that "(i)n so holding, we essentially leave to Congress, and not to the courts, the decision as to whether an agency's refusal to institute proceedings should be judicially reviewable." *Id.*, at 1659.

Turning to the Commodity Exchange Act, the applicable statute in this case, under 7 U.S.C. §13a-1:

Whenever it shall appear to the Commission that any contract market or other person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any provision of this chapter or any rule, regulation or order thereunder ... the Commission may bring an action in the proper district court of the United States ... to enjoin such act or practice, or to enforce compliance with this chapter, or any rule, requisition or order thereunder . . .

(emphasis added). It is clear that §13a-1 is expressly permissive, stating that the Commission may bring actions in federal district court. Similarly, §13(a) provides that:

If any contract market is not enforcing or has not enforced its rules of government made a condition of its designation as set forth

in section 7 of this title, or if any contract market, or any director, officer, agent, or employee of any contract market otherwise is violating or has violated any of the provisions of this chapter or any of the rules, regulations, or orders of the Commission thereunder, the Commission may ... make and enter an order directing that such contract market, director, officer, agent, or employee shall cease and desist from such violation

(emphasis added). See, also, §15 (describing powers Commission may exercise to secure effective enforcement). Thus, it appears from the statute that Congress took no steps whatever to limit the CFTC's discretion in deciding whether to institute certain enforcement proceedings. In the absence of any language that might arguably rebut the presumption of non-reviewability, and in the absence of any discussion at all by Plaintiff with respect to this issue, the court declines to intrude on an area seemingly within the sound discretion of the CFTC.

Even if it were possible for this court to

compel the CFTC to take some action on Plaintiff's behalf, we note that the action Plaintiff seeks is to force the Board of Trade to comply with a rule that is itself completely permissive. Rule 550.00 clearly states that upon presentation of a member's petition, the Board of Directors may instruct the Chairman of the Board to appoint a committee to examine the petition and determine whether the petitioner is entitled to a rehearing. If it does so, the Board may, after receiving the committee's report, order a rehearing and, if upon rehearing it is found that the member was mistakenly suspended, the Board of Directors may set aside the prior disciplinary action, but even then, the Board may not do this if four or more Directors vote against such action. Any question whether the Board is under any obligation to afford a petitioner a rehearing is extinguished by the last paragraph, which states "(a) rehearing is not a right. An action of the Board is final when rendered as provided in

Regulation 540.07, and the suspension, expulsion, or fine will be considered final until set aside or reduced under this rule." In sum, even if we could in some way force "compliance" with this rule, Plaintiff would not necessarily be entitled to a rehearing and certainly would not necessarily be entitled to reinstatement.

Finally, Plaintiff's allegations fail to state a claim upon which relief can be granted in any event, as all of his claims have been previously adjudicated, adversely to him. To the extent Plaintiff contends he has been and continues to be a victim of fraudulent concealment, his claim is barred by an earlier ruling by Judge Flaum that no information was withheld from him. Rosee v. Commodity Futures Trading Commission, No. 79 C 3459 (N.D. Ill. Oct. 31, 1960). To the extend that Plaintiff asserts that he was defrauded by his clearing firm or that he did not receive a fair hearing before the arbitration committee, these claims are also barred by earlier rulings in the state

courts, see Rosee v. Board of Trade, 43 Ill. App. 3d 203, 356 N.E. 2d 1012 (1976), cert. denied, 434 U.S. 837 (1977), and this fact was explained to him in a memorandum opinion by Judge Will denying one of Plaintiff's many Rule 60(b) motions. Rosee v. Board of Trade, No. 63 C 1348, mem. op. at 6 (N.D. Ill. Aug. 24, 1982) ("We have observed before that, whether or not Mr. Rosee was defrauded by his brokers or failed to receive a fair hearing by the Arbitration Committee of the Chicago Board of Trade are not matters over which we have any jurisdiction. Moreover, rightly or wrongly, they have been finally decided against him by the state courts and that decision is res judicata."). Finally, to the extent Plaintiff alleges that he has "newly discovered evidence" which confirms a conspiracy against him by the CFTC and the Board of Trade, we must disagree. We have reviewed the attachments to Plaintiff's complaint and find that they in no way establish the existence of any conspiracy against Plaintiff.

We note also that Plaintiff presented precisely the same evidence to Judge Will in the context of a Rule 60(b) motion, and Judge Will also found that this "newly discovered evidence" did not constitute any evidence of a conspiracy. Rosee v. Board of Trade, No. 63 C 1348, mem. op. at 6-9 (N.D. Ill. Jan. 6, 1984). We have made our own independent assessment of the evidence Plaintiff presents, but find nothing that would cause us to disagree with Judge Will's conclusions.

Conclusion

We are not unsympathetic to Plaintiff's obvious frustration at the Board of Trade's continued refusal to rectify what Plaintiff contends is a manifest injustice; however, as difficult as it may be to understand or accept, the solution to Plaintiff's problem lies solely with the Board of Trade. This court simply has no authority to grant the relief Plaintiff seeks. Accordingly, Defendants' motions to dismiss the complaint are granted.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604
Submitted August 27, 1987*

September 18, 1987

O R D E R

Plaintiff-appellant, proceeding pro se, appeals from his latest setback in what has been a twenty-six year effort to gain reinstatement as a member of the Chicago Board of Trade.

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The district court's opinion in this case correctly concluded that the federal courts lack the authority to compel the Commodity Futures Trading Commission (CFTC) to undertake the type of enforcement proceedings sought by appellant.^{2/} Moreover, even if the CFTC could

*After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." See Fed. R. App. P. 34(a); Circuit Rule 34(f). No such statement having been filed, the appeal has been submitted on the brief and record.

^{2/}Appellant's reply brief refers to a letter written by Senior District Judge Will in which he recalls that signatures he examined on trading cards that were part of appellant's 1966 lawsuit were obvious forgeries and not the signature of appellant. This revelation has no significance as neither the district court nor this Court has the authority, regardless of the circumstances, to order the CFTC to reopen its investigation of this case.

be ordered to compel the Board of Trade to afford appellant another hearing before the Board, the grounds upon which appellant seeks reinstatement have all been previously adjudicated and resolved adversely to him. Accordingly, we adopt Judge Plunkett's order as our own opinion on appeal.

Appellant has been the repeated beneficiary of remarkable judicial forbearance over the course of the nearly three decades during which he has pursued this litigation, a course which has brought him before this court twice previously. See, Rosee v. Board of Trade of the City of Chicago, 311 F. 2d 524 (7th Cir. 1963); Rosee v. Board of Trade of the City of Chicago, Nos. 78-2021 and 78-2598 (7th Cir. March 19, 1980) (unpublished order). Enough, however, is enough; at some point appellant must acknowledge if not accept, defeat. This is especially true where, as here, appellant's appeal is merely perfunctory which is to say that he merely seeks a judicial 'second opinion' while making no attempt whatsoever to address the reasoned decision of the district court. In circumstances such as these, Fed. R. App. P. 38 permits us to impose sanctions, and we hereby do in the amount of \$1000.00 payable to the United States Treasury within 30 days.

AFFIRMED WITH SANCTIONS

